IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
March 8, 2005 Session

BRIAN VAL KELLEY v. STATE OF TENNESSEE

Direct Appeal from the Criminal Court for Wilson County
No. 99-1455 John D. Wootten, Jr., Judge

No. M2004-01158-CCA-R3-PC - Filed September 15, 2005

The petitioner appeals the denial of his post-conviction petition, contending specifically that: (1) the term "wrongfulness" as used in the insanity statute should have been defined to the jury so as to encompass moral wrongfulness; (2) the evidence was insufficient to support the verdict and sufficient to sustain the defense of insanity; (3) trial counsel rendered ineffective assistance; and (4) Tennessee Code Annotated section 39-11-501 is unconstitutional as applied to the petitioner. Following our review, we conclude that the issues presented were either previously determined, waived, or without merit and that the term wrongfulness as used in the insanity statute encompasses both moral and legal wrongfulness. Therefore, we affirm the denial of post-conviction relief.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

JOHN EVERETT WILLIAMS, J., delivered the opinion of the court, in which JOSEPH M. TIPTON and NORMA MCGEE OGLE, JJ., joined.

David L. Raybin, Nashville, Tennessee, for the appellant, Brian Val Kelley.

Paul G. Summers, Attorney General and Reporter; David H. Findley, Assistant Attorney General; Tom P. Thompson, Jr., District Attorney General; and Robert N. Hibbett, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Facts and Procedural History

In this appeal, the petitioner, Brian Val Kelley, challenges the denial of post-conviction relief from his 1999 convictions of one count of premeditated first degree murder and one count of murder committed in the perpetration of or attempt to perpetrate aggravated child abuse. Following the jury verdict, the trial court merged the convictions and sentenced the petitioner to life imprisonment. A panel of this court affirmed the judgment on direct appeal. See State v. Brian Val Kelley, No. M2001-00461-CCA-R3-CD, 2002 Tenn. Crim. App. LEXIS 424 (Tenn. Crim. App., at Nashville,

May 7, 2002) app. denied (Tenn. Oct. 21, 2002). On October 15, 2003, the petitioner, through counsel, filed a petition for post-conviction relief. The post-conviction court heard the matter on April 30, 2004, and subsequently denied relief. The petitioner now timely appeals to this court contending that:

(1) the proper definition of the term "wrongfulness" as employed in the insanity statute is not limited to legal wrongfulness, but includes moral wrongfulness;
(2) the term "wrongfulness" should have been defined in the jury instructions;
(3) the evidence was insufficient to support the verdict;
(4) trial counsel rendered ineffective assistance; and
(5) Tennessee Code Annotated section 39-11-501 is unconstitutional as applied to the petitioner.

Upon thorough review, we affirm the post-conviction court's denial of relief.

The facts underlying the convictions were summarized in this court's direct appeal opinion:

> Officer Mike Wentzell, with the Lebanon Police Department, testified that he was on duty at 12:52 a.m. August 15, 1999, when the police received a request for assistance at 512 Stonehenge Drive, in Lebanon, Tennessee. When Wentzell arrived, Lori Kelley, [the petitioner's] wife, was waiting in the front yard and ran out to meet his police car. Wentzell testified that Ms. Kelley was crying and screaming and wanted to know whether he could perform CPR. Wentzell answered affirmatively. Ms. Kelley informed Wentzell that her baby was not breathing, and then led him into the Kelley's house via the back door. Ms. Kelley also informed Wentzell that she believed her husband had killed their baby by smothering it.
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> Officer Wentzell testified that he called out [the petitioner's] name upon entering the Kelley's house. Wentzell could hear [the petitioner's] voice and subsequently found him standing in the doorway to the bedroom. He was naked and unarmed. Wentzell asked [the petitioner] what was going on. [The petitioner] replied that he had "smothered the baby." Wentzell asked why. [The petitioner] responded that God had directed him to sacrifice his daughter because she was perfect and innocent. [The petitioner] also told him that Jesus was coming soon. [The petitioner] took Wentzell to a room at the back of the house which strongly smelled of vomit. Wentzell testified that the child in the crib was obviously dead – her skin was extremely white and her lips were blue.
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> . . . .
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> Wentzell transported [the petitioner] from the crime scene to the Lebanon Police Department and, some time later, he also transported him to the Wilson County jail. Wentzell testified that during the ride to the jail, [the petitioner] told Wentzell that he appreciated Wentzell's kindness toward him and that he knew what he did was "wrong." Wentzell said that he noticed a slight change in [the petitioner's] personality at this point, but he did not elaborate further on this observation during his testimony.

> Detective Scott Osborn interviewed [the petitioner] when he arrived at the Lebanon Police Department with Officer Wentzell. Osborn testified that one of the first things [the petitioner] said was, "What do you want to know? I killed my daughter, the father told me to do it." [The petitioner] also discussed various events of his life, including a religious experience at a golf course and Jesus' presence in a woodcarving booth at the fair. In Osborn's opinion, [the petitioner] had no problem understanding what was said to him, although Osborn had some difficulty keeping [the petitioner] "focused." [The petitioner] appeared "very calm." At certain points during the interview, he placed his hands behind his head, rocked back, and put his feet up on to the table.
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> After the interview, Osborn left the room to give [the petitioner] time to compose the following written statement, which was read into evidence at trial: "I, Brian Kelley, killed my daughter, Erin Elaine Kelley, so that Christ could return." [The petitioner] signed the statement and dated it: "8/15/99, 3:27 a.m."

Kelley, 2002 Tenn. Crim. App. LEXIS 424, at **7-11.

At the post-conviction hearing, Joy Patterson testified that she was employed by the Department of Mental Health and Developmental Disabilities as a Director of Forensic and Juvenile Court Services. She stated that, in preparation for the hearing, she compiled the files of defendants who were charged with homicide and were requested to have either inpatient or outpatient mental evaluations. Patterson further organized this information into a chart that documented the number of those individuals who had been acquitted by reason of insanity in Tennessee since 2000, and obtained copies of the court orders in the cases. She explained that "301(a) Admit" denotes a pre-trial evaluation conducted to determine a defendant's mental condition at the time of an alleged crime, or his or her competency to stand trial while "303(a) Admit" indicates an evaluation conducted to determine committability following a verdict of not guilty by reason of insanity.

Patterson acknowledged that she was unaware whether the acquittals she reported were the product of contested trials or plea bargains. When asked if she knew of any case since 1995 in which a defendant charged with homicide was acquitted by reason of insanity in a contested jury trial, she responded, "I don't have that information," and further noted that she had no personal knowledge of such an instance. Referencing her research, Patterson testified that in 2001, eighty-five defendants were evaluated and four had support for the insanity defense; in 2002, eighty-six were evaluated and four supported; and in 2003, seventy-nine were evaluated and three supported.

In answer to questions posed by the post-conviction court, Patterson testified that her research did not go back to 1995 because the internal record keeping began in 2000. She further acknowledged that in 2000, one in nine evaluations resulted in support for the insanity defense while approximately one in twenty evaluations supported the defense in 2001 and 2002.

Marthagem Whitlock testified that she was also employed by the Tennessee Department of Mental Health and Developmental Disabilities as a Deputy Assistant Commissioner for Mental

Health Services. She stated that she was familiar with Tennessee's insanity defense both under Graham v. State, 547 S.W.2d 531 (Tenn. 1977), and under the statute implemented in 1995. Whitlock noted that the research referenced by Patterson was prepared with her cooperation and that she believed it to be accurate. She explained that psychiatrists and psychologists with health service provider designations lead the evaluation teams and are responsible for the reports and mental health evaluations. Whitlock further testified that Drs. Farooque and Craddock, both of whom testified for the petitioner at trial, had been with the Department for at least ten years, or since the current insanity statute was enacted.

Whitlock acknowledged that the court orders they receive following an acquittal by reason of insanity do not specify whether the cases are contested or resolved by agreement. When asked if a defendant had been acquitted by reason of insanity in a contested jury trial since 1995, she answered that she had "no information on that" and that she did not have any personal knowledge of such an acquittal. On cross-examination, Whitlock explained that she did not have any information at all regarding the nature of the proceedings that resulted in acquittals by reason of insanity. On re-direct examination, Whitlock testified that the pre-1999 statistics were kept manually and therefore might be less reliable. Finally, she stated that the length of time between the pre-trial evaluation and adjudication is rarely less than a year, and on average is several years.

Next, Dr. William Bernet testified that he is a psychiatrist and the Director of Forensic Psychiatry at Vanderbilt Medical School. He stated that he interviewed the petitioner and spent approximately thirty hours reviewing the petitioner's mental health records, clinical records, and various legal documents. Dr. Bernet indicated that at the time of the crime, the petitioner was suffering form a mental disease or defect, specifically bipolar disorder I with severe psychotic features.

Dr. Bernet explained that the petitioner received varying diagnoses because he suffered from delusions and hallucinations, both of which are symptoms of ten to twelve different mental conditions. He noted that the petitioner required prolonged observation, as the proper diagnosis is dependent on how long the symptoms persist. Dr. Bernet described the petitioner's condition as one or more episodes of severe depression followed by one or more episodes of manic behavior, which occurs when an individual displays an elevated, expansive, or irritable mood for at least a week. He described the petitioner's manic episode, which began in July or August 1999, as expansive and grandiose, in that the petitioner believed that he was communicating directly with God and that he was "chosen" of God. Dr. Bernet testified that the petitioner also had "pressure of thoughts" and was distracted. He noted that during the course of the petitioner's treatment, he was prescribed multiple medications including a mood stabilizer (Valporic Acid), an anti-psychotic medication (Risperdal), and an anti-depressant.

Dr. Bernet estimated that the petitioner's global assessment of functioning (GAF) would have been scaled at fifteen on the day of the crime, meaning that he was "out of touch with reality having

delusions and hallucinations, and he was in danger of hurting himself and others."[1] He further noted that with treatment, the petitioner's scaled score would increase.

Dr. Bernet testified that the second component of the insanity test is whether "the person is unable to appreciate either the nature or wrongfulness of the behavior." He stated that he believed that, although the petitioner could appreciate the legal wrongfulness of his act, he could not appreciate its moral wrongfulness. In support, Dr. Bernet recalled that the petitioner stated that he was doing what God and the Holy Spirit asked him to. In contrast, Dr. Bernet noted that the 9/11 terrorists could not be adjudicated insane because they did not operate under any delusion or hallucination but were acting within "a culturally accepted belief system."

Dr. Bernet testified that Robert Schopp's book, Automatism, Insanity, and Psychology of Criminal Responsibility, outlines the different types of wrongfulness, and each definition's faults from a practical standpoint. He stated that the three types of wrongfulness are: (1) legal wrongfulness; (2) moral (societal) wrongfulness; and (3) personal wrongfulness. Dr. Bernet recalled that no definition of wrongfulness was charged to the jury in the petitioner's trial and that moral and legal wrongfulness were not distinguished. He emphasized the importance of defining wrongfulness and stated that it is imperative that everyone is "talking about the same thing." He noted that while mental health professionals understand that the definition of wrongfulness varies from state to state, for the purposes of diagnosing medical insanity, they almost unanimously use the moral wrongfulness standard.

Dr. Bernet testified that the primary issue in this case was not the existence of a mental illness but, rather, the definition of wrongfulness. He further indicated that the word wrongfulness, as opposed to the word criminality, implicates moral wrongfulness rather than legal wrongfulness. Dr. Bernet stated that "if the definition of insanity was that the person did not appreciate the criminality of an act, there would be almost nobody ever who would be insane." Finally, Dr. Bernet testified that he had evaluated patients under both the Graham standard and the statute enacted in 1995, and was unaware of anyone who has been acquitted by reason of insanity in a contested homicide jury trial since 1995.

On cross-examination, Dr. Bernet reiterated that medical professionals think of wrongfulness in terms of moral wrongfulness but will work within the definition adopted in their state. He further acknowledged that the experts who testified in the petitioner's case were given an opportunity to explain how they defined wrongfulness. He further noted that, in his opinion, wrongfulness means moral wrongfulness, which can encompass either societal or personal moral wrongfulness but not simply legal wrongfulness. Dr. Bernet stated that in different cases, societal or personal wrongfulness could be interjected in the definition but, in this case, the petitioner could have met either definition. Finally, he stated that it is theoretically possible for a defendant to commit a murder, meet the standard of the insanity defense, and not be committable.

[1] Dr. Bernet explained that the GAF is scaled from one to one hundred, with one being the most impaired and one hundred being excellent function. He noted that a person's GAF can vary from time to time and that the average person would be scaled in the eighties.

On redirect examination, Dr. Bernet explained that insanity relates to a patient's mental condition at the time of an offense while committability relates to the present mental condition. He stated that one could not be insane and not committable at the same point in time. On recross-examination, Dr. Bernet noted that "some mental disorders. . . only last for a week or so." When questioned by the post-conviction court, Dr. Bernet noted that different defendants could meet one or any combination of the three definitions of wrongfulness. He stated most often, however, a defendant would meet the definition of personal wrongfulness because their actions would seem to them to be the right thing to do. Dr. Bernet testified that if personal wrongfulness were the definition, "more people would be found insane."

On further redirect examination, Dr. Bernet stated that the personal wrongfulness definition would allow the greatest number of defendants to be adjudicated insane; the societal wrongfulness definition would allow the second greatest number, and the legal wrongfulness definition would allow the least number of insane adjudications.

As the final witness at the post-conviction hearing, trial counsel testified that he had practiced law for twenty-five years and that he considered criminal law an area of expertise. He stated that he became involved with the case only hours after the crime occurred and that he represented the petitioner through trial. He stated that he contacted the district attorney's office the day after the offense and arranged for the petitioner to be evaluated at the Cumberland Mental Health Center. Trial counsel testified that he personally investigated the case, including speaking to the petitioner "on numerous occasions," and interviewing lay witnesses to establish the petitioner's behavior patterns leading up to the crime. He also recalled that several experts were called to testify for the defense, including Dr. Martell, who was originally intended to testify for the State.

Trial counsel testified that he composed trial notebooks that contained most of the petitioner's mental health records and estimated that he spent "hundreds and hundreds of hours" in preparation of the case. He further noted that he "called every criminal defense lawyer that had tried an insanity case under the new law and talked about their case with them and tried to get tips from them on what they had done right, [and] what they had done wrong."

When asked about the definition of wrongfulness, trial counsel replied:

> My thought was that [the prosecution] had asked our experts about wrongfulness under Schopp's book. I thought they handled that very well. I was pleased with the way they responded. I didn't think it was necessary to go into any more detail, and frankly, I didn't know any other definition.

However, trial counsel agreed with Dr. Bernet that wrongfulness should be defined, "so everybody is on the same page."

On cross-examination, trial counsel testified that he did not raise the constitutionality of the insanity statute because he knew that it had been held constitutional by Tennessee courts at the time of trial. He reiterated that he was not aware of any legally accepted definition of wrongfulness, either at the time of trial or at the post-conviction hearing.

Following the presentation of proof, the post-conviction court made the following findings of fact on the record:

> I think there are about 37 paragraphs, separate paragraphs [in the post-conviction petition], but when you look at it, you whittle it down to two basic areas here, ineffective assistance of counsel and then the issue as to wrongfulness or, and I'm going to couch it as a constitutional issue, but there are multiple paragraphs that address those broad, general issues, and having been the trial judge and seeing [counsel] operate and also hearing him testify today, looking at just the volumes for his trial notebook and hearing him testify about his investigation of the matter, calling witnesses both expert and lay on this issue of insanity, even using the State's expert that they hired, he called him, and given the state of the law as it existed in 2000 when this matter went to trial, I don't think that any Court could find him anything but effective rather than ineffective.
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> So I make that finding, that he did all that he believed to be humanly possible, and looking at it objectively, I think it was more than effective; just the result was bad.
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> Now, with regard to the second issue, and the constitutional issue of the definition of wrongfulness, I have to go back into my memory bank a little bit, and there was discussion in the course of this trial about defining it or not defining it, and I want to say that at some juncture, at a break or whatever, I was even trying to look at a dictionary or two. . . . and I came to the conclusion that I thought [the term] was pretty self-explanatory.
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> You know, you may be right, Mr. Raybin, with regard to the Graham case where our Supreme Court maybe more clearly defined the standard, but the State Legislature in 1995 decided to adopt this particular definition. One can only presume, I think, and most Courts reckon with the fact that the legislature in this state or in any state is presumed to kind of know what the status of the law is, that it has been promulgated by our Supreme Court or the Court of Criminal Appeals or whatever, and they, shall I say, more narrowly drafted this particular statute. They didn't include the moral definition as you related to be the Graham standard. . . .
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> But that kind of begs the question, part of the post-conviction relief statute talks about raising issues that have not been previously determined. A lengthy segment section of [the direct appeal] opinion talks about the insanity defense, and then beginning on page 26 of the slip opinion, the jury instructionary [sic] goes on for about a page with regard to wrongfulness, and the Attorney General pointed out the last line of that section of this opinion, but there's some language above that which talks about the defendant has a constitutional right to a complete and correct charge of the law. . . .

> I think that language touches on this issue of wrongfulness, Mr. Raybin, and quite frankly, I think it has basically been pre-determined by the Court of Criminal Appeals. I realize you put a different twist to it, but I believe it has by this particular paragraph and the segments of the opinion immediately precede [sic] that addressed those areas.
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> . . . So with all due respect, sir, I'm going to overrule and deny your Motion in its entirety and wish you well, and again, I'm sorry there aren't any winners in this case.

The petitioner timely appeals to this court, challenging the denial of post-conviction relief.

Analysis

I. The Definition of "Wrongfulness"

The greatest portion of the petitioner's brief challenges the absence of a jury instruction on the definition of wrongfulness, as it is used in the insanity statute, and the corresponding lack of any legally accepted definition of the term in statutory or case law. Specifically, he contends that the term should be defined so as to encompass moral wrongfulness, as opposed to merely legal wrongfulness. In support, the petitioner points to State v. Graham, 547 S.W.2d 531 (Tenn. 1977), a precursor to the current insanity statute, and particularly notes the words of Justice Henry, who opined, "it will be noted that we have used the word 'wrongfulness' in the place of 'criminality' so that the rule requires an appreciation of the wrongfulness of conduct as opposed to its criminality." Id. at 543. In 1995, the Legislature codified the standard announced in Graham, but did not include any definition of wrongfulness in its provisions. The petitioner now requests that we define the term as Graham suggests and hold pursuant to State v. Flake, 88 S.W.3d 540 (Tenn. 2002), that no reasonable jury could have rejected his defense of insanity, given the newly established definition.

We would first note, as did the post-conviction court, that this issue appears to have been previously determined by a panel of this court on direct appeal. After initially noting defense counsel's agreement to the proposed jury instructions, this court held "that the instructions given by the trial court were a complete and correct charge of the current law concerning an insanity defense, [and that the] Defendant [was] not entitled to relief on this issue." Kelley, 2002 Tenn. Crim. App. LEXIS 424, at *72. Therefore, because the merits of this issue have been addressed, it is precluded from our review. See Tenn. Code Ann. § 40-30-106(h) (2003).

Moreover, it appears to us that the post-conviction relief statute is not the proper vehicle by which to assert this contention. This issue was not waived on direct appeal; rather a panel of this court reviewed the merits. Had this issue been waived, we could consider it now as evidence of ineffective assistance of counsel, and the petitioner would still bear the burden of proving prejudice. Having concluded infra that the term wrongfulness is commonly understood to include both moral and legal wrongfulness, no other definition was necessary. Further, given that the various definitions of wrongfulness were presented to the jury *via* expert witnesses, we fail to see how the petitioner

could show prejudice. To address the issue as presented, we would in essence be allowing a direct appeal of this issue.

The Legislature had before it the opinion in Graham, and the opportunity to define wrongfulness when the statute was enacted in 1995; however, it did not. "'Legislative intent or purpose is to be ascertained primarily from the natural and ordinary meaning of the language used, without forced or subtle construction that would limit or extend the meaning of the language.'" Jackson v. General Motors Corp., 60 S.W.3d 800, 804 (Tenn. 2001) (quoting Hamblen County Educ. Ass'n v. Hamblen County Bd. of Educ., 892 S.W.2d 428, 431 (Tenn. Ct. App. 1994)). In this instance, the Legislature opted not to define wrongfulness, and we likewise decline to broaden or narrow a term that it felt required no further elaboration.

II. Sufficiency of the Evidence

The petitioner's issues four and five concern the sufficiency of the evidence; specifically he contends that the evidence was insufficient to support the convictions (issue four) and that the evidence presented by the defense established the affirmative defense of insanity by clear and convincing evidence (issue five). However, as we have previously noted, post-conviction proceedings cannot be used to raise and relitigate issues decided on direct appeal. See, e.g., State v. Wright, 475 S.W.2d 546 (Tenn. 1972); Long v. State, 510 S.W.2d 83 (Tenn. Crim. App. 1974). The petitioner presented these questions on direct appeal, and a panel of this court addressed and rejected them at that time:

> Here, Defendant contends that he met his burden of proof in establishing the defense of insanity by clear and convincing evidence. Defendant argues that the successful establishment of this defense, without conflicting proof, rendered the evidence against him insufficient to support his convictions. After a thorough review of the record, we respectfully disagree with Defendant.
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> First, we observe that the proof adduced at trial was clearly sufficient to prove beyond a reasonable doubt that Defendant intentionally and with premeditation killed his daughter. Defendant confessed to his wife, Officer Mike Wentzell, Detective Scott Osborn, Detective James Burton, and numerous medical personnel that he committed the crime. The proof revealed that Defendant intentionally killed his daughter to pave the way for Christ's second coming and, further, that the act was premeditated, i.e., the intent to kill her was "formed prior to the act itself." Tenn. Code Ann. § 39-13-202(d) (1997). Defendant admitted that he argued with God when he first received instructions to kill his child and that his first attempt to smother her with the teddy bear was unsuccessful. Thus, he resorted to using his hand, in the fashion of a "baptism." The proof was also sufficient for a rational jury to find that Defendant killed his daughter in the perpetration of or attempt to perpetrate aggravated child abuse. His actions clearly adversely affected the child's

> health and welfare, constituting abuse which resulted in serious bodily injury to the child. See Tenn. Code Ann. § 39-15-402 (1997).
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> . . .
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> With regard to the first prong [of the insanity defense], whether Defendant suffered from a severe mental disease or defect, the proof overwhelmingly supports Defendant's position. Of the four medical experts who testified concerning Defendant's mental health at the time he killed his daughter, all four concurred that he suffered from a severe mental disease during his commission of the crime. The State presented no rebuttal expert testimony and, in fact, the expert witness initially recruited by the State to support its case ultimately rendered an opinion in favor of the Defendant.
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> The second prong is another matter. After viewing the evidence in the light most favorable to the State, we conclude that a rational trier of fact could have found that Defendant failed to show that his mental disease or defect resulted in his inability to appreciate the nature of wrongfulness of his criminal actions by clear and convincing evidence.

Kelley, 2002 Tenn. Crim. App. LEXIS 424, at **56, 59-62. Therefore, as it has previously been determined that the affirmative defense of insanity was not proven and that the evidence presented was sufficient to support the verdicts, we will not re-address that issue in this appeal. See Tenn. Code Ann. § 40-30-106(h).

The petitioner also contends that because Flake had not been decided by our supreme court at the time of the direct appeal opinion, "a reassessment of the proof [regarding the insanity defense] is necessary." We disagree. Although the petitioner correctly states that Flake had not yet been released, the direct appeal opinion in the present case employed virtually the same standard as that which was ultimately determined to be appropriate in Flake. Specifically, on direct appeal, this court concluded that "a rational trier of fact could have found that Defendant failed to show that his mental disease or defect resulted in his inability to appreciate the nature or wrongfulness of his criminal actions by clear and convincing evidence." Kelley, 2002 Tenn. Crim. App. LEXIS 424, at *62. Similarly, in Flake, the supreme court concluded that the proper standard by which to review a jury's rejection of the insanity defense is whether "no reasonable trier of fact could have failed to find that the defendant's insanity at the time of the offense was established by clear and convincing evidence." Flake, 88 S.W.3d at 554. Therefore, even if this issue of sufficiency were re-addressed under Flake, this court's conclusion on direct appeal would not be altered.

III. Ineffective Assistance of Counsel

This court reviews a claim of ineffective assistance of counsel under the standards of Baxter v. Rose, 523 S.W.2d 930 (Tenn. 1975), and Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984). The petitioner has the burden to prove that: (1) the attorney's performance was deficient; and (2) the deficient performance resulted in prejudice to the defendant so as to deprive him of a fair trial. Strickland, 466 U.S. at 687, 104 S. Ct. at 2064; Goad v. State, 938 S.W.2d 363, 369 (Tenn.

1996); Butler v. State, 789 S.W.2d 898, 899 (Tenn. 1990). The failure to prove either deficiency or prejudice justifies denial of relief; therefore, the court need not address the components in any particular order or even address both if one is insufficient. Goad, 938 S.W.2d at 370. In order to establish prejudice, the petitioner must establish a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694, 104 S. Ct. at 2068.

The test in Tennessee to determine whether counsel provided effective assistance is whether his or her performance was within the range of competence demanded of attorneys in criminal cases. Baxter, 523 S.W.2d at 936. The petitioner must overcome the presumption that counsel's conduct falls within the wide range of acceptable professional assistance. Strickland, 466 U.S. at 689, 104 S. Ct. at 2065; State v. Honeycutt, 54 S.W.3d 762, 769 (Tenn. 2001). Therefore, in order to prove a deficiency, a petitioner must show "that counsel's acts or omissions were so serious as to fall below an objective standard of reasonableness under prevailing professional norms." Goad, 938 S.W.2d at 369 (citing Strickland, 466 U.S. at 688, 104 S. Ct. at 2065).

In reviewing counsel's conduct, a "fair assessment . . . requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct and to evaluate the conduct from counsel's perspective at the time." Nichols v. State, 90 S.W.3d 576, 587 (Tenn. 2002) (citing Strickland, 466 U.S. at 689, 104 S. Ct. at 2065). The fact that a particular strategy or tactic failed or hurt the defense does not, standing alone, establish unreasonable representation. However, deference to matters of strategy and tactical choices applies only if the choices are informed ones based upon adequate preparation. Henley v. State, 960 S.W.2d 572, 579 (Tenn. 1997); Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982).

In his brief, the petitioner alleges several instances of ineffective assistance of counsel including:

(1) Counsel's failure to file a special request as to the definition of wrongfulness or to object to the failure to define wrongfulness in the jury instructions;
(2) Counsel's failure to object to the State's remark regarding wrongfulness: "Guess who gets to define 'wrong'; you get to define 'wrong.'";
(3) Counsel's statement to the trial court that the definition of wrong or wrongfulness in the jury instruction was "acceptable," thus waiving the issue; and
(4) Counsel's failure to challenge the constitutionality of Tennessee Code Annotated section 39-11-501.

At the post-conviction hearing, counsel testified that the defense experts were questioned regarding Schopp's book and the various definitions of wrongfulness. He recalled that he "thought [the experts] handled that well" and that he did not feel "it was necessary to go into any more details [regarding the definition], and frankly, [he] didn't know any other definition." Further, counsel recalled that he did not challenge the constitutionality of the insanity statute because he knew that Tennessee courts had determined that it was constitutional at the time of trial. Ultimately, the post-conviction court determined that counsel did not render ineffective assistance and further concluded

that a panel of this court had previously determined that the jury charge given regarding wrongfulness was complete and accurate as of the date of trial. We agree.

The petitioner is not entitled to the benefit of hindsight, may not second-guess a reasonably based trial strategy, and may not criticize a sound, but unsuccessful, tactical decision made after adequate preparation of the case. Adkins v. State, 911 S.W.2d 334, 347 (Tenn. Crim. App. 1994); see Cooper v. State, 847 S.W.2d 521, 528 (Tenn. Crim. App. 1992). The record reflects that counsel diligently prepared by seeking the advice of every attorney who had argued the insanity defense under the 1995 statute in advance of the petitioner's trial. Further, several experts were called to testify for the defense, given the opportunity to explain how they defined wrongfulness, and cross-examined regarding Schopp's book. Counsel indicated that his experts responded "well" to questions regarding the definition of wrongfulness and that he did not believe further definition was necessary. Moreover, it appears that even if he had requested such a definition, neither the attorneys at trial nor the trial court was aware of a legally accepted definition of the term.

In our view, counsel's trial strategy was sound. Absent any established definition of wrongfulness, counsel relied on the defense experts to provide explanations regarding the various definitions of wrongfulness and to opine as to why the petitioner met the standards of the insanity defense. All of counsel's actions indicate that he strategically placed the issue of wrongfulness before the jury, making them mindful of the definitions of wrongfulness that would be beneficial to the petitioner's case.

Ultimately, however, the jury determined that the petitioner was able to appreciate the wrongfulness of his actions, as was its prerogative. The fact that a particular strategy or tactic failed or hurt the defense does not, standing alone, establish unreasonable representation if counsel's choices are informed and based upon adequate preparation. Henley v. State. 960 S.W.2d 572, 579 (Tenn. 1997); Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982). In the present case, the record reflects counsel's diligence in all facets of the trial and demonstrates that he represented the petitioner to the best of his abilities, working within the parameters of the insanity law as it existed at the time of trial. Therefore, we agree with the post-conviction court that the petitioner was not ineffective in this regard.

Regarding counsel's failure to challenge the constitutionality of the insanity statute, we note that counsel testified that he was aware that our courts had ruled the insanity statute, as codified at Tennessee Code Annotated section 39-11-501, constitutional at the time of trial. Therefore, counsel's failure to challenge the statute was not deficient performance.

IV. Constitutionality of Tennessee Code Annotated Section 39-11-501

Finally, the petitioner's issues ten, eleven, and twelve concern the constitutionality of section 39-11-501. Specifically, he contends that:

> (10) the aforementioned section violates the Fifth, Sixth, and Fourteenth amendments to the United States Constitution because no person has either

been acquitted by reason of insanity in a contested jury or bench trial, or had their conviction reversed on direct appeal since its enactment in 1995;

(11) the section is unconstitutional as applied to the petitioner because he was suffering from a severe mental disease or defect and was unable to appreciate the nature or wrongfulness of his actions; and

(12) the section is unconstitutional as applied to the petitioner because the requirement imposed upon the petitioner to prove the affirmative defense of insanity by clear and convincing evidence unconstitutionally shifts the burden of proof in violation of Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428 (2002) and Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348 (2002).

Initially, we note that the petitioner's constitutional arguments are waived for failure to assert them on direct appeal. Nonetheless, we will proceed to the merits of the issues. Tenn. Code. Ann. § 40-30-106(g) (2003).

Taking the contentions in order, we first consider post-conviction counsel's filed affidavit, which indicates that, since 1995, thirteen defendants charged with homicide have been acquitted by reason of insanity, with all thirteen dispositions coming as a result of an agreed order or a non-contested disposition. He further notes that ten defendants asserted the defense in a contested jury trial, resulting in ten verdicts of guilt and ten affirmed convictions on appeal. Relying principally on these statistics, the petitioner contends that the insanity statute is unconstitutional, as it was applied arbitrarily by prosecutors.

A statute is void for vagueness if it does not "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." Kolender v. Lawson, 461 U.S. 352, 358, 103 S. Ct. 1855, 1858 (1983). The latter of the two aforementioned requirements is of greater importance because, "[a] vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." Grayned v. City of Rockford, 408 U.S. 104, 108, 92 S. Ct. 2294, 2299 (1972).

Where a constitutional vagueness challenge involves no First Amendment issue, we are to evaluate it in light of the statute's application to the facts of the case. Maynard v. Cartwright, 486 U.S. 356, 361, 108 S. Ct. 1853, 1857-58 (1988). Further, when analyzing a vagueness challenge to a criminal statute, we are to read its terms using their "natural and ordinary meaning." State ex rel. Woodall v. D & L Co., W1999-00925-COA-R3-CV, 2001 Tenn. Crim. App. LEXIS 357, at *25 (Tenn. Ct. App., at Jackson, May 16, 2001) (citing Boles v. City of Chattanooga, 892 S.W.2d 416, 420 (Tenn. Ct. App. 1994)). "The fair warning requirement, however, does not demand absolute precision in the drafting of criminal statutes." State v. Burkhart, 58 S.W.3d 694, 697 (Tenn. 2001) (citation omitted).

In this instance, we agree with the post-conviction court that the term wrongfulness was "self-explanatory" and afforded the petitioner a sufficient understanding of the elements that must

be proven to successfully assert the insanity defense. We conclude that wrongfulness is commonly understood to be against the laws or morals of society:

> There is no practical distinction between moral and legal right or wrong in a murder case. Under any rational legal system ever devised murder would be prohibited. And under any rational moral system ever imagined murder would be reprehensible. This defendant's delusion is his only explanation for the killing.

State v. Hamann, 285 N.W.2d 180, 183 (Iowa 1979). In this case, however, the petitioner's delusion was coupled with an unequivocal statement that he knew what he did was "wrong" and that "he could be punished for it." Kelley, 2002 Tenn. Crim. App. LEXIS 424, at *13. Therefore, the jury was justified in determining that the petitioner was able to appreciate the wrongfulness of his conduct. Likewise, had the petitioner's delusion been that the sheriff told him to kill and he made a statement indicating that he knew the act was against God's law or asked God's forgiveness, a rational jury could conclude that he appreciated the wrongfulness of his act.

Although the petitioner offered proof of a more particularized definition that supported his defense, no further definition was required to prevent arbitrary enforcement. In our view, the instructions given were neutral and allowed both parties to argue their respective theories of the case. Moreover, no further instructions were necessary to correct or clarify the testimony elicited at trial. To successfully assert the insanity defense, the petitioner must have proven by clear and convincing evidence that: (1) he suffered from a mental disease or defect; and (2) he was unable to appreciate the nature or wrongfulness of his acts. Tenn. Code Ann. § 39-11-501 (1999). Given the facts, we cannot conclude that the State acted arbitrarily in failing to stipulate that the petitioner was insane.

Next, the petitioner contends that the section is unconstitutional as applied because the petitioner was suffering from a severe mental disease or defect and was unable to appreciate the nature or wrongfulness of his actions. However, in our view, this is a restatement of the petitioner's previous challenge to the sufficiency of the evidence. As we have noted, that issue was heard and disposed of on direct appeal and we will not re-address it here.

Finally, the petitioner contends "that Tennessee's statutory scheme regarding the insanity defense violated his due process right to a fair trial because sanity is an implicit element of an offense, and due process requires that the prosecution prove implicit elements beyond a reasonable doubt. Thus, the interpretive 'gloss' placed on the statute and the burden shifting component of the insanity statue to the defense in unconstitutional in violation of [Ring and Apprendi]." However, as the petitioner concedes, our courts have previously addressed this issue and held that sanity is not an element of a crime:

> Likewise without merit is the defendant's assertion that the statutory insanity defense, Tennessee Code Annotated section 39-11-501, which requires the defendant to prove insanity by clear and convincing evidence, is unconstitutional under Apprendi and Ring. For the second time, the defendant contends that the statute is unconstitutional because it does not require the prosecution to prove sanity to a jury beyond a reasonable doubt. Again, we must disagree. Insanity is an affirmative defense, not a fact that, if found, increases a defendant's authorized punishment. Flake, 88 S.W.3d at 551. Therefore, requiring a defendant to prove insanity, an

affirmative defense analogous to a mitigating circumstance, does not violate Apprendi or Ring.

State v. Holton, 126 S.W.3d 845, 865 (Tenn. 2004); see also State v. Holder, 15 S.W.3d 905, 911 (Tenn. Crim. App. 1999). Therefore, in keeping with previous holdings of our courts, we likewise reject this contention.

Conclusion

The denial of post-conviction relief is affirmed.

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JOHN EVERETT WILLIAMS, JUDGE